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In the Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST N. MORIAL,

Petitioner

versus

COUNCIL OF THE CITY OF NEW ORLEANS,
AND SIDNEY J. BARTHELEMY,
JOSEPH I. GIARRUSSO,
FRANK FRIEDLER, JR.,
JAMES M. SINGLETON,
MIKE EARLY, BROD BAGERT,
PHILIP C. CIACCIO,
INDIVIDUALLY AND AS MEMBERS OF THE
COUNCIL OF THE CITY OF NEW ORLEANS,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA STATE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Orleans City Council Ordinance directing the City Executive Branch to deduct dues owed to labor organizations from city employees' payroll checks violates the Fourteenth Amendment due process rights of the Executive Branch and the separation of powers doctrine.

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Ernest N. Morial petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Louisiana denying his petition for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeal, State of Louisiana, directing him, as Mayor of the City of New Orleans, to implement a dues check off procedure as a part of the administration of the City payroll.

OPINIONS BELOW

The opinion of the Civil District Court for the Parish of Orleans, State of Louisiana, is attached (Appendix "A"). The opinion of the Fourth Circuit Court of Appeal, State of Louisiana, is attached (Appendix "B"). The denial of rehearing by the Fourth Circuit Court of Appeal, State of Louisiana, is attached (Appendix "C"). The denial of writ of certiorari by the Louisiana State Supreme Court is attached (Appendix "D").

JURISDICTION

The judgment of the Civil District Court (Appendix "A") was entered June 26, 1980. The judgment of the Fourth Circuit Court of Appeal was entered March 22, 1982. Rehearing was denied by the Fourth Circuit on May 19, 1982. The Supreme Court of Louisiana denied writ of certiorari on September 17, 1982.

Jurisdiction is conferred on this Court by 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the

equal protection of the laws."

STATEMENT OF THE CASE

The ordinance at issue herein, Number 7246 M.C.S., was originally enacted by the Council of the City of New Orleans (hereinafter referred to as "Council"), on August 2, 1979. In essence, this ordinance requires the Department of Finance for the City of New Orleans to implement a payroll withholding plan for any city employee who furnishes the appropriate authorization for the purpose of "withhold(ing) from his salary a specific amount for payment of his dues or other expenses to any organization to which he belongs or to which he incurs expense which are related to his employment with the City...."

The ordinance was enacted by the Council in the aftermath of the February-March 1979 strike by members of the Department of Police for the City of New Orleans, and in response to an action by Mr. Erroll G. Williams, Director of Finance for the City of New Orleans, to deny "dues check off" privileges to certain organizations, including the Police Association of Louisiana (commonly referred to as "PANO"), and the Public Employees Association ("PEA"), both of whom are Intervenors in the instant litigation.

The due process and equal protection aspects of the administrative decision to deny withholding to some groups while permitting withholding for others were chal-

lenged by PANO in a separate lawsuit. In that litigation, entitled *Patrolmen's Association of Louisiana v. City of New Orleans*, Civil Action No. 79-1458 (United States District Court for the Eastern District of Louisiana, 1979), the Honorable Morey L. Sear held that the City has the right to refuse dues check offs to those unions which do not have contracts with the City. Additionally, PANO challenged the decision to deny check offs in state court, but lost. (Suit No. 79-4559, Civil District Court, Parish of Orleans, New Orleans, Louisiana, decision by the Honorable S. Sanford Levy.)

Based on the above cited decisions and pursuant to his authority under Section 4-206(2) of the Home Rule Charter for the City of New Orleans, the Mayor of the City of New Orleans, Ernest N. Morial, vetoed the ordinance on August 10, 1979. On August 16, 1979, the Council, by a one vote margin, overrode the Mayor's veto and enacted Ordinance No. 7246 into law.

Thereafter, the instant suit was filed by Mayor Ernest N. Morial, plaintiff, seeking to have the ordinance declared null and void on the grounds that it is an illegal and *ultra vires* act of the Council which violates the doctrine of separation of powers mandated by state and local law.

REASONS FOR GRANTING THE WRIT

The decision of the Louisiana Supreme Court should

be reviewed, pursuant to Rule 17, because the New Orleans City Council Ordinance directing the Executive Branch to deduct dues owed to labor organizations from city employees' payroll checks violates the Fourteenth Amendment due process rights of the Executive Branch and the separation of powers doctrine. We urge the Court to grant the writ.

"It may be stated then, as a general rule inherent in the American Constitutional System, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power...." *Springer v. Phillipine Islands,* 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1928).

Violation of the doctrine or separation of powers occurs when there is an assumption by one branch of powers that are central or essential to the operations of a coordinate branch, provided that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement the legitimate policies of the government. *Chadha v. Immigration and Naturalization Service,* 634 F.2d 408 (9th Cir. 1980).

The City of New Orleans is governed by the Home Rule Charter of 1954, a document which provides for a Mayor/Council form of government wherein the Mayor heads the executive branch of government and the City Council is the legislative branch of city government. Pursuant to Section 4-206 of the Home Rule Charter of the

City of New Orleans, the Mayor is empowered to exercise directly or through the chief administrative officer, supervision over all executive and administrative work of the City and is responsible for exercising all executive and administrative powers of the City.

Conversely, the City Council, pursuant to Section 3-101 of the Home Rule Charter of the City of New Orleans, is vested with legislative responsibility including the authority to adopt pay plans for both classified (i.e., civil service) and unclassified employees of the City. However, pursuant to Section 3-118 of the Home Rule Charter, the City Council's authority is restricted to either accepting or rejecting pay plans and leaving the final authority with the executive branch of city government.

This Honorable Court has recognized the importance of the separation of powers doctrine. See *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Just as Article I, Section 7 of the United States Constitution, defines and implements the separation of powers doctrine, the above cited provisions of the Home Rule Charter define and implement the separation of the executive and legislative branches of city government.

Except for the adoption of pay plans (subject to the final approval by the executive branch) and except for the control of its own staff, the City Council has no authority over employees of the City of New Orleans. The appointment, promotions, transfers, and dismissals of all

employees in city government is under the jurisdiction of the executive branch. See Section 4-102 of the Home Rule Charter of 1954 of the City of New Orleans.

However, in adopting Ordinance 7246 M.C.S. the City Council usurped the powers reserved to the executive branch pursuant to the separation of powers formula contained in the City of New Orleans Home Rule Charter. Rather than provide that final approval for a dues check off policy be obtained from the Mayor (for unclassified employees) or the Civil Service Commission (for classified employees), the ordinance requires the executive branch to deduct dues from the pay checks of all city employees so authorizing.

Not only does the ordinance violate the separation of powers provisions of the Home Rule Charter of the City of New Orleans, it also violates the authority and responsibility of the Civil Service Commission as set forth in Article X of the Constitution of the State of Louisiana. That constitutional provision gives the Civil Service Commission the authority to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and employee training and safety. See Article X (A)(1) of the Constitution of the State of Louisiana.

Ordinance 7246 M.C.S. requires the deduction of dues for classified employees without the advice and

consent of the Civil Service Commission. In accordance with the Constitution and the provisions of the Home Rule Charter governing the authority of the Civil Service Commission, the jurisdiction over civil servants employed by the City is governed by that Commission, and not by the City Council.

In effect, this ordinance of the legislative branch of City government usurped power properly exercisable by another branch of government. Such action violates the separation of powers principles of the United States Constitution. See *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, (D.C. Cir. 1982), 673 F.2d 425.

The rights and duties of the Civil Service Commission are reviewed in *Civil Service Commission of the City of New Orleans v. Rochon*, 374 So.2d 164 (La. App. 4th Cir. 1979). The Court stated:

> "The Commission alone has the authority to set compensation in the form of salaries, including overtime, of city employees with Civil Service status. To allow the city to ignore the commission...as it does in this case,...would have the effect of eroding, or possibly even destroying the constitutional and executive authority of the Commission in the area of compensation for civil employees...."

In the instant case, the City Council passed Ordinance 7246 M.C.S. with no consultation with the Civil

Service Commission. This was not only a violation of the separation of powers doctrine, but a violation of due process of law which has been applied to the States by the Fourteenth Amendment of the United States Constitution.

Due process of law requires that there be a legitimate basis for the adoption of an ordinance requiring a coordinate branch of government to take action. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976). Since the Civil Service Commission has constitutional authority over all classified City employees, it should have the opportunity to pass on the rationality and desirability of a law requiring that the executive branch deduct dues for organizations with whom the City has not signed a collective bargaining agreement.

CONCLUSION

To coerce Ernest N. Morial and the Executive Branch to implement a "dues check-off" system would violate due process of law and the separation of powers doctrine. We urge the Court to grant the writ.

Respectfully submitted,

DONALD A. HOFFMAN

Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon Council of the City of New Orleans, and Sidney J. Barthelemy, Joseph I. Giarrusso, Frank Friedler, Jr., James M. Singleton, Mike Early, Brod Bagert, Philip C. Ciaccio, individually and in their official capacities as members of the Council of the City of New Orleans. Service on all parties was effected by placing copies of the Petition in the United States Mail prepaid. I further certify that all parties required to be served have been served.

NEW ORLEANS, Louisiana, this_____day of December, 1982.

Respectfully submitted,

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